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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARLOS VEGA HERNANDEZ, Defendant and Appellant.	A150602 (Napa County Super. Ct. No. CR167610)

Defendant Carlos Vega Hernandez seeks reversal of a judgment of conviction for the first degree murder of Esperanza Vega, to whom he was married, on the grounds that the trial court wrongly denied his motion for a mistrial after the jury heard improper and incurably prejudicial testimony, and the court failed to instruct on the meaning of "provocation" in the context of second degree murder. We conclude these arguments are meritless and affirm the judgment.

BACKGROUND

In March 2014, the Napa County District Attorney filed an information against defendant charging him with one count of murder (Pen. Code, § 187, subd. (a)[1]). The district attorney alleged that defendant personally used a deadly and dangerous weapon, a knife (§ 12022, subd. (b)(1)), and committed a serious felony (§ 1192.7, subd. (c)(23). A jury trial followed. Defendant admitted killing Vega, but claimed he did so without any intention or thought after she scorned him, and then wrestled with him to prevent his killing himself.

[1] All of our statutory references are to the Penal Code unless otherwise stated.

I.

Prosecution Evidence

At trial, defendant's daughter, whom we shall refer to hereafter as J., testified. She said in the early morning of September 12, 2013, when she was 12 years old, she awoke to discover defendant killing her mother, Vega, in the bathroom of their Napa, California apartment. Her parents had a "horrible" relationship that was not "healthy" or "safe." They argued a lot and defendant was "very aggressive" towards Vega. After one argument, J. photographed bruises on Vega's back and arm, which photographs she identified at trial.

J. said Vega and she moved out of the family apartment at the beginning of August 2013, but Vega moved them back in by the middle of the month. At first, defendant was very loving towards Vega, but the two soon started to argue again and defendant stopped living at the apartment by the end of the month. He came uninvited to J.'s birthday party on August 31, 2013, carrying a six-pack of beer, and he called Vega a "slut" in front of other family members. In the days after, he came by the family apartment and made a lot of noise banging on its doors and windows.

On the morning of September 10, 2013, J. found defendant in the apartment. He was also there the next day, September 11, and the three went out for dinner and ice cream. Then, as J. did homework at home, Vega and defendant went to church. When they returned, defendant was shockingly happy, overly excited and talkative, and unusually loving toward Vega, while Vega was "kind of happy" but seemed lost in her own thoughts. The three watched television together. Around 10 p.m., J. fell asleep on the floor of the bedroom the three shared as defendant and Vega talked to each other.

J. woke up later that night to the sound of her mother yelling, "No, Carlos, don't do it. I have a daughter, don't do it." J. heard defendant say, "No, you're going to die, you stupid bitch." J. heard the bathroom door close and her mother say, "No." J. tried unsuccessfully to open the bathroom door, then shoved it open and found defendant shirtless and on his knees holding a knife in his hand and staring with "evil" eyes. Vega was lying beside the toilet with her eyes rolled back in her head and blood was

everywhere. J. asked defendant why he had done what he had done, and defendant said Vega was going to ruin him.

Defendant went to the living room. J. soon followed. She found him sitting on the couch with the knife in his hand. It was a little after 3:30 a.m. J. eventually called the police, urged on by defendant, who told her to tell them to kill him. He put on a shirt, told J. to have a nice life and left the apartment with the knife around the time police arrived.

Curtis Madrigal, a police officer with the City of Napa, testified that he was on patrol the night Vega was killed and was dispatched to the family's apartment, arriving there shortly after 3:30 a.m. He saw a tall, heavy-set Hispanic male, who was defendant, exit the apartment holding a knife in his left hand. Madrigal yelled at him to drop the knife. Defendant said "no" multiple times and walked down the stairwell pointing the knife in Madrigal's general direction, then began walking back up the stairs as he continued to point the knife towards Madrigal. A younger Hispanic female told defendant to put down the knife. He kept saying "no," but eventually he put it down and police took him into custody. He did not smell of alcohol.

Brian Donahue, another police officer with the City of Napa, testified that he was dispatched to the family apartment that night too. In the bathroom, he found the body of a Hispanic female between the toilet and the tub, with underwear around the knees. One arm was over the toilet and one arm was over the tub. There was a large amount of blood pooled in the tub, blood smears everywhere, blood splatter on the side of the tub and inside it, and blood all over the body, some of which Donahue identified in a photograph at trial. There was blood, urine and toilet paper inside the toilet bowl. As shown in another photograph Donahue reviewed, the bathroom door's inside frame was damaged around the lock and an area beneath the lock was stained with blood.

Todd Shulman, another police officer with the City of Napa, testified that he had contact with defendant at the Napa police department on the day of Vega's killing. Defendant did not show any signs of intoxication. The parties stipulated that his blood sample, taken at 7:27 a.m. on September 12, was tested and did not contain any alcohol

or drugs. Shulman testified that defendant had a laceration on his left palm, several smaller scratches on that hand, and an abrasion on each shoulder.

Multiple witnesses also testified about events prior to Vega's killing. A neighbor, Brenda Rodriguez, testified that two days before, on September 10, she saw defendant banging on a window of the family apartment, as he had the week before, and Rodriguez heard a woman telling him he needed to leave. About two hours later, Rodriguez saw the woman who lived in that apartment sweeping up glass. Then, on September 11, at about 11:45 p.m., Rodriguez was leaving her residence when she saw defendant sitting on the ground outside the family apartment. When she returned about 15 minutes later, he was shaking the apartment's door handle and banging on the window. Rodriguez thought she heard a woman say "leave" in Spanish. Defendant was talking also. His tone seemed frustrated and then more aggressive.

Monique Rose Garcia lived next door to the family apartment. She testified that for months she heard defendant and Vega arguing a lot, hearing mostly defendant's voice. In the two weeks prior to September 12, 2013,Vega did not let defendant into the apartment. He slept outside and knocked on the apartment door. One day, within a week of September 12, Garcia heard defendant arguing to be let in and glass shattering. On September 12, she was awakened at 12:30 a.m. or 1:00 a.m. by banging on the walls. She heard the daughter crying out on the phone that her mother had been stabbed.

Scott Holliday, a police sergeant with the City of Napa, testified that he was dispatched to the family apartment on the afternoon of September 9, 2013. Defendant was sitting on a balcony littered with broken glass, agitated and talking to himself. He smelled of alcohol, staggered as he walked and seemed very intoxicated. He said he had been drinking because of family problems and an elderly relative's illness in Mexico. He admitted breaking the window, saying he needed to get his diabetes medication. He agreed to go to a rehabilitation center temporarily. The parties stipulated that Vega told a police officer that day that she did not want to press charges or have defendant arrested. She said he had left the apartment 12 days before and she was concerned about his high level of intoxication, his breaking the window and that he would continue to try to get

into the apartment. She said "she did not want [defendant] restrained from returning to the apartment and that she wanted him to come home but that he needed to be sober."

Elisa Robledo Dueñas, Vega's sister, testified that she visited Vega at her apartment five or six months before she was killed. Vega and defendant were there. Vega was crying and had a pink-colored injury on her forehead. She said defendant had hit her, and defendant said he had hit her because, as Dueñas put it, "he was mad." Another sister testified that a month or two before September 12, 2013, Vega told her that she was going to seek family child support because defendant was not giving her any money.

A child support specialist for the Department of Napa County Child Support Services testified that she received a child support application on September 6, 2013, and met with Vega and defendant on September 10, 2013. Defendant seemed upset. He repeatedly insisted to Vega that she close the support case and that he was going to be okay and would change. Vega replied that he had been saying that for years and had not changed. The specialist determined that defendant should pay Vega $373 per month. Vega said she would work with defendant on the actual number. The specialist told defendant he could face jail time if he did not pay once his obligation was set. The couple argued as they left.

Joseph Cohen testified as a forensic pathology expert about his autopsy of Vega's body. He found numerous incised wounds on the hands, mostly on the palms, and numerous stab wounds. Among them were two deep, potentially fatal stab wounds that punctured areas of the left lung, and another fatal stab wound, the "most devastating" one, that perforated the subclavian artery underneath the collarbone, resulting in significant blood loss. Cohen concluded that Vega died of bleeding and hypoxia, her heart stopping five to ten minutes after being stabbed. She was wearing earplugs in each ear at the time of her death.

David Cropp, an expert on domestic violence, testified about the pattern of abuse and coercion involved in domestic violence. He said domestic violence is designed to control the victim. It begins with tension building, is followed by an "acute episode" that

involves a "barrage" of anger, and is then followed by contrition and a "honeymoon" phase. The cycle repeats, but the victim often does not leave the relationship or report the abuse to authorities.

The prosecution also presented the testimony of Luis Andres Vega, Jr., Vega's cousin. As we will discuss, the court struck his testimony and instructed the jury to disregard it, but denied defendant's motion for a mistrial based on it.

II.

Defense Evidence

Defendant presented several witnesses about his relationship with Vega and testified on his own behalf. He acknowledged bruising Vega and putting his hands on her at times, and he said it was wrong. Also, Vega sometimes tried to hit him and he would grab her to stop her. At J.'s party, he said he was going to leave Vega and made a rude comment about her; at the time, he suspected she was cheating on him.

Defendant also testified that on September 9, 2013, he went to the family apartment after drinking for certain belongings, pills and his wallet. When Vega did not answer the door, he knocked on the window, but it was fragile and it broke. The police arrived and took him to a state hospital. He wanted treatment, but did not want to go to a "crazy" hospital. He thought Vega wanted him taken to one. He left the hospital and Vega let him in the apartment.

The next day, defendant agreed to go with Vega to set up child support. He had been giving Vega money and was paying for the apartment and food. He was angry because Vega would not let him in the apartment. They talked as they went to set up child support and Vega agreed to give him another chance if he stopped drinking.

On the morning of September 11, 2013, defendant made breakfast for J., then he and Vega took her to school, and Vega went to work. That evening, the three went out for dinner and ice cream. He walked hand in hand with Vega, who was very loving towards him. At her suggestion, the two went to church and asked God for help with his drinking problem. They returned home and watched television with J., who went to bed about 10 p.m., after which the two talked awhile and went to bed together.

Around 1 a.m., defendant, unable to sleep, went to the living room and watched television. At about 1:30 a.m., Vega joined him. When he tried to caress her, she pulled away. He asked her what was going on and she said she loved another man who was much more of a man than he, and that he was nothing as a man. Her words "broke [his] heart" and "parted [his] soul." They argued, sometimes screaming at each other. He said he was going to kill himself. She said, " 'Do what you want to, crazy man,' " and that she did not care where he went. He knew their relationship was over, but he still wanted to stay with her.

After about 20 minutes of arguing, Vega went into the bathroom. Defendant went to the kitchen and grabbed a knife. He was thinking about killing himself. He was stressed and depressed because of his mother's recent death and his separation from Vega. It "all came together." He also took the knife because he wanted to "threaten" Vega to tell him "who was that person," but he did not intend to kill her. He acknowledged he told Officer Ortiz the morning he killed Vega that he took the knife to threaten her and did not mention to Ortiz that he threatened to kill himself.

Defendant went to the bathroom to get Vega to tell him who the other man was before he killed himself. He planned to threaten her with the knife. He did not close the bathroom door although he might have closed it with his feet later, and he never locked it. He first testified that when he entered the bathroom, Vega said to him, " 'Don't harm yourself' " as he raised the knife towards his throat and told her he was going to kill himself. He acknowledged telling Ortiz that Vega said only, " 'Don't kill me,' " but testified she only said this at first because she was afraid he was going to harm her.

In the bathroom, defendant "yelled" he was going to kill himself and Vega said, " 'No, Carlos, no. We have a daughter.' " They screamed back and forth for five minutes. Vega grabbed the knife and he cut her hands. He became afraid in his mind and was in shock. He grabbed her and told her to tell him "who that person was" and began stabbing her. He testified, "When I—when she grabbed the knife and I saw blood. My mind—I didn't want to, but when I finally knew it, I had stabbed her fatally. But I never

in my mind had the idea that I would—" As he stabbed her, she yelled, and probably said, " 'No, Carlos, no.' "

Asked if he recalled stabbing Vega the first time, defendant said his "mind was blocked" and that he "didn't know anything." He did not aim as he stabbed Vega, and could not recall how many times he stabbed her. He heard J. screaming and stopped. J. pushed the door and he moved his feet, which might have been blocking the door. He was trying to get Vega up. He thought he had injured her, but not fatally. He left the bathroom and did not try to help her again although he wanted to, because he "was not in any condition to think."

Defendant wanted to call the police, but J. already had the phone in her hand. J. called the police and defendant told her to tell them to come and kill him. He told J. he "saw [Vega] as if she were dead." His mind was "all wild." He washed the knife and put on a shirt. He waited for the police to arrive and left the apartment with the knife to confront them, hoping to provoke them to kill him. He heard his daughter screaming, " 'Drop the knife, daddy.' " He dropped it because he thought if the police fired they might hit her.

After he was arrested, he gave a statement to the police while he was "[d]evastated." He "probably" told Ortiz that he stabbed Vega three times and might have shown him how he did it by grabbing Ortiz with his right hand and pretending to strike Ortiz with a knife in his left hand.

III.

Prosecution Rebuttal Evidence

Alfonso Ortiz, a police officer for the city of Napa, testified for the prosecution in rebuttal. On September 12, 2013, he interviewed defendant, who was "very cooperative and a little excited. Calm and sometimes kind of confused and nervous." Ortiz recalled that at one point in the interview, defendant said something like, " 'It would have been better off to punch her.' " Ortiz testified that the English translation of defendant's comment in Spanish contained in the interview transcript was, " 'Well, I was desperate, a dumb asshole. Why didn't I just give her some fucking punches and that's it.' "

IV.

Verdict, Sentencing and Appeal

The jury found defendant guilty of first degree murder and found true the allegation that he personally used a deadly weapon. The court sentenced him to 25 years to life for the murder and one year, to be served consecutively, for his personal use of a deadly weapon. It awarded him credit for time served, imposed certain fines and fees and ordered him to pay restitution.

DISCUSSION

I.

The Trial Court's Denial of Defendant's Motion for a Mistrial

Defendant argues the trial court abused its discretion and denied him his constitutional due process rights when it denied his motion for mistrial. Defendant moved for a mistrial after a witness testified that defendant said he had a 15-year-old girlfriend, which testimony had not been disclosed to the defense in discovery. The court struck all of the witness's testimony and instructed the jury to disregard it. Defendant's claim lacks merit.

A. The Relevant Proceedings Below

Before trial, the prosecution moved to introduce J.'s testimony that defendant appeared at her August 31, 2013 birthday party drunk and yelled profanities at Vega. The trial court ruled this evidence admissible.

At trial, the prosecution called as witnesses regarding defendant's conduct at the party both J. and Vega's cousin, Luis Andres Vega, Jr. Vega, Jr. testified that defendant, drunk at the party, told Vega he hated her, was tired of her, was going to leave her and did not care about her. Asked if defendant said anything at the party about having a girlfriend, Vega, Jr. replied, "He did say about that. He had a 15-year-old girlfriend that he was—." At this point, defense counsel objected and asked to approach the bench. After a sidebar, the court announced a brief recess for the jury so that counsel and the court could "discuss an issue briefly."

After the jury left the court room, defense counsel asserted that the prosecution had not disclosed this evidence of a 15-year-old girlfriend in discovery. The court stated that the offer of proof in the prosecution's pre-trial motion mentioned profanities but not a girlfriend. The prosecutor said he had revealed to the defense that Vega, Jr. would testify about a girlfriend, but not that Vega, Jr. would refer to her age, which he had not previously told the prosecutor. Defense counsel moved for a mistrial on the ground defendant was incurably prejudiced by the jury hearing he was having sex with a minor. She said the defense could not "unring the bell . . . . It's a big deal if he was committing a sex offense with a minor." She requested in the alternative that Vega, Jr.'s entire testimony be stricken and the jury be admonished to disregard it.

The court stated it was inclined to strike the part of Vega, Jr.'s testimony about defendant saying he had a 15-year-old girlfriend. Although the court thought it was a "sort of a catch 22" for the defense to strike it because that would also highlight the testimony, the court did not see any other remedy. The prosecutor opposed the mistrial motion. He thought the effect of the testimony could be cured by an admonition to the jury to disregard it. If the court did not think this would work, the prosecution opposed striking the entire testimony because the jury had "already heard it."

The court denied the mistrial motion, saying that, while "the defense is understandably frustrated and angry by what happened here, I don't think it rises to the level of a mistrial." It struck all of Vega, Jr.'s testimony and told the jury "that there's nothing in his testimony that you can consider. And I know probably the first thing you might do is speculate well, why? And that's just basically not a matter for your consideration. But his testimony has been stricken. It's not part of your evaluation in the case." The court also later instructed the jury to disregard all testimony that was stricken from the record.

B. Defendant's Claim of Error Lacks Merit.

We review the trial court's denial of defendant's motion for a mistrial for abuse of discretion. (*People v. Rices* (2017) 4 Cal.5th 49, 92.) " ' "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction.

[Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. . . ." [Citation.] A motion for a mistrial should be granted when " ' "a [defendant's] chances of receiving a fair trial have been irreparably damaged." ' " ' " (*People v. Dement* (2011) 53 Cal.4th 1, 39–40.)

"A motion for a mistrial presupposes error plus incurable prejudice. ' "The burden is on the accused to establish prejudice where there has been a lack of timely discovery, and in the absence of prejudice the judgment must be affirmed." ' " (*People v. Gatlin* (1989) 209 Cal.App.3d 31, 38.) Furthermore, "[i]t is axiomatic that the prejudicial effect of errors may be overcome by subsequent corrective action such as the admonishment of the jury and that in such event the error may be deemed cured." (*People v. Ryan* (1981) 116 Cal.App.3d 168, 184; accord, *People v. Martin* (1983) 150 Cal.App.3d 148, 163.)

The only issues at trial were about defendant's state of mind, i.e., whether he intended to kill Vega and, if he did, whether he acted with deliberation and premeditation. " ' " 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.]" [Citation.] " ' "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . . " ' " ' [Citation.] To prove a killing was ' "deliberate and premeditated," ' it is 'not . . . necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.' (Pen. Code, § 189.)" (*People v. Disa* (2016) 1 Cal.App.5th 654, 664–665.)

Defendant's claim of prejudicial error is unconvincing because of the brevity of Vega, Jr.'s testimony that defendant had a 15-year old girlfriend, and because of the ample evidence supporting his first degree murder conviction. Vega, Jr.'s testimony was both vague and little more than a sentence. After the defense objected to it, the court immediately heard argument outside the presence of the jury. It then quickly struck Vega, Jr.'s entire testimony and instructed the jury to disregard it altogether. In doing so, the court avoided calling attention to the testimony about the girlfriend. The court's

action substantially diminished any impact of Vega, Jr.'s testimony. As one court put it in concluding a prosecutor's solicitation of improper, brief testimony was not prejudicial in light of the trial court's "prompt" admonishment to the jury to disregard it, " 'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.' " (*People v. Fitzgerald* (1972) 29 Cal.App.3d 296, 312; see also *People v. Loker* (2008) 44 Cal.4th 691, 740 [finding no prejudice from prosecutor's expression of personal views in part because of the court's "prompt" admonishment of the jury]; *People v. Hill* (1992) 3 Cal.4th 959, 1002 [no prejudice caused by an "abbreviated" spectator outburst, after which "the jury was promptly and thoroughly admonished"].)

Furthermore, Vega, Jr.'s testimony can hardly be called prejudicial in light of the ample evidence supporting defendant's first degree murder conviction. The prosecution presented compelling evidence that defendant was a violent man who repeatedly, physically abused Vega. It established that in the weeks before he killed Vega, she was increasingly standing up to his abuse, barring him from their apartment and insisting that he pay child support. Prosecution witnesses testified that Vega said defendant was not giving her any money, and that he demanded Vega drop her child support demand. Two days before the killing, they met with a child support specialist from the local agency, during which defendant urged Vega to drop her case and she declined.

There was evidence that on the night defendant killed Vega, defendant acted with premeditation and deliberation to murder her after she had again stood up to him. A neighbor, Rodriguez, saw him just before midnight locked out of the family apartment and trying to get back in and heard a woman tell him to leave. A next-door neighbor, Garcia, said she was awakened at 12:30 or 1:00 a.m. that night by banging on the walls. After apparently having reentered the apartment somehow, defendant went to the kitchen to get a knife. The physical evidence indicates he attacked Vega when she was in a vulnerable position on the toilet in the bathroom. Her body was found with earplugs in both ears and her underwear around the knees lying by the bathroom toilet, which

contained urine and blood. J.'s testimony that she had to force the bathroom door open and the evidence of damage to the door itself indicates that defendant locked or blocked the door to ensure Vega could not escape.

There was also evidence that defendant knew what he was doing when he killed Vega. J. testified that she heard defendant tell Vega, "you're going to die, you stupid bitch." Defendant stabbed Vega over and over again, and inflicted three different potentially fatal wounds. J. said that when she gained entry to the bathroom and asked defendant why had had done what he had done, he said Vega was going to "ruin" him. Officer Ortiz testified that later that same morning, defendant told him, " 'Well, I was desperate, a dumb asshole. Why didn't I just give her some fucking punches and that's it.' "

Thus, the jury was presented with consistent, compelling evidence that defendant murdered Vega with the deliberation and premeditation required for a first degree murder conviction. This evidence shows he was a violent, desperate, angry man who believed he was losing control over his wife, his home and his finances. One night, after Vega again locked him out of their apartment, he decided to kill her because, in his words, she was going to ruin him. While she was in the bathroom, he went to the kitchen and got a knife, entered the bathroom, locked and/or blocked the door and brutally and deliberately stabbed her to death, with their 12-year-old daughter nearby. This evidence together towers in significance over Vega, Jr.'s brief, vague testimony that about two weeks before, defendant had said he had a 15-year-old girlfriend. Further, that testimony is not more disturbing than defendant's violent conduct in the weeks before and during his killing of Vega.

Defendant's testimony that he only intended to kill himself after Vega announced her love for another man and scorned him was patently incredible in the face of this ample evidence of first degree murder. Also, his own account is full of contradictions. For example, defendant testified that Vega was loving towards him when they went out for dinner and ice cream and that they went to sleep together that night, but he claimed with no explanation that she scorned him a few hours later. He said he took the knife

from the kitchen to the bathroom in order to threaten Vega for the identity of this other man and then kill himself, but it made little sense to seek this information if he was about to kill himself; he acknowledged he did not mention his suicide plan to police later that morning; and in any event there was no evidence that he attempted to kill himself. He at first testified that when he entered the bathroom, Vega urged him not to hurt himself, but then admitted he told police later that morning that she urged him not to hurt her. He claimed he had no recollection of stabbing Vega, but he acknowledged that he might have demonstrated to Officer Ortiz later that morning how he stabbed her. He said that when he realized he had stabbed Vega, he wanted to help her, but he quickly left the bathroom and did not attempt to help her afterwards.

In short, although defendant contends his was a close case regarding his intent in killing Vega, it was not. The trial court neither abused its discretion nor violated defendant's due process rights. It reasonably concluded that striking Vega Jr.'s testimony altogether and instructing the jury to disregard it was sufficient to counter any impact the girlfriend testimony might have had on the jury. Defendant has not overcome the presumption that the jury followed the court's instructions. (See, e.g., *People v. Avila* (2006) 38 Cal.4th 491, 571–574 [affirming trial court's ruling on the strength of the evidence to deny a mistrial motion and instruct the jury to disregard testimony by a witness that after the murders, a co-defendant said defendant was just out of prison, crazy and going to kill the witness if he did anything].)

II.

The Trial Court's Jury Instructions Regarding Provocation

Defendant argues we must also reverse his murder conviction because the trial court failed to instruct the jury with a definition of "provocation" in the context of second degree murder, although the term has a technical meaning peculiar to the law. The People argue defendant has forfeited this appellate claim by not raising it first in the trial court and that in any event it lacks merit. Assuming for the sake of argument that defendant has not forfeited his claim, we reject it because it rests on the incorrect

assertion that "provocation" has a technical meaning peculiar to the law. Further, even assuming for the sake of argument that the court erred, it was harmless.

A. The Relevant Jury Instructions

The trial court instructed the jury on first degree and second degree murder and on voluntary manslaughter based on heat of passion.

The court instructed on first degree murder with CALCRIM No. 521: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before completing the act that caused death." Also, "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated."

The court orally instructed the jury on the effect of provocation on defendant's criminal liability with CALCRIM No. 522:

"Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide.

"If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter." [2]

The court instructed the jury on voluntary manslaughter based on heat of passion using CALCRIM No. 570. It stated in relevant part:

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[2] The court's written instruction stated: "Provocation may reduce a murder from first degree to second degree. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder."

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in a heat of passion.

"The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment."

The court further stated using CALCRIM No. 570:

"In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

"It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same acts, would have reacted from passion rather than from judgment.

"If enough time passed between the provocation and the killing for an ordinary person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis."

B. Defendant's Claim Lacks Merit.

Defendant argues the trial court erred because it failed to instruct on the term "provocation" in the context of second degree murder, although the court was required to do so sua sponte because the term has a technical meaning peculiar to the law (see, e.g, *People v. Richie* (1994) 28 Cal.App.4th 1347, 1360). We disagree.

"The trial court has a sua sponte duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence. [Citation.] This sua sponte duty encompasses instructions on lesser included offenses that are supported by the evidence.

[Citation.] Additionally, even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly. [Citation.] Once the trial court adequately instructs the jury on the law, it has no duty to give clarifying or amplifying instructions absent a request." (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1331 (*Hernandez*).)

Defendant's argument boils down to this: the trial court's instruction to the jury regarding provocation was inadequate because, although the court correctly instructed that provocation in the context of voluntary manslaughter was of an objective nature, i.e., such that a reasonable person would have been provoked to kill without malice, the court wrongly failed to instruct the jury that provocation in the context of second degree murder was of a subjective nature, i.e., such that, reasonable or not, the defendant acted upon it with an intent to kill rather than with premeditation and deliberation. The court's error was prejudicial because the jury, reading the instructions as a whole, could well have wrongly evaluated defendant's liability for first and second degree murder by considering whether he acted in response to provocation of an objective nature only.

We are unpersuaded by defendant's argument. Very similar arguments have been rejected by two other appellate courts. In *People v. Jones* (2014) 223 Cal.App.4th 995 (*Jones*), the defendant argued the same CALCRIM instructions on provocation as those we have referred to here, Nos. 521, 522 and 570 (as well as No. 520, which the trial court also gave here), "were misleading because they did not, or did not explicitly, inform the jury that the objective standard applies only for reduction of murder to voluntary manslaughter, and does not apply to reduce first to second degree murder." (*Jones*, at p. 999.) The appellate court concluded there was no error because, among other things, the instructions were correct. "They accurately inform the jury what is required for first degree murder, and that if the defendant's action was in fact the result of provocation, that level of crime was not committed. CALCRIM Nos. 521 and 522, taken together, informed jurors that 'provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation.' [Citation.] As the jury also was instructed, a reduction of murder to voluntary manslaughter requires

more. It is here, and only here, that the jury is instructed that provocation alone is not enough for the reduction; the provocation must be sufficient to cause a person of average disposition in the same situation, knowing the same facts, to have reacted from passion rather than judgment." (*Id*. at p. 1001.)

Similarly, in *Hernandez, supra,* 183 Cal.App.4th 1327, the defendant asserted that CALCRIM No. 522 was "incomplete and misleading" because, among other things, it "fails to instruct the jury that provocation insufficient for manslaughter may be sufficient for second degree murder." (*Hernandez*, at p. 1331.) The *Hernandez* court, after reviewing the law regarding the gradations of homicide culpability (*id*. at pp. 1331–1333), noted that "an instruction on provocation [required] for [a] second degree murder [conviction] is a pinpoint instruction that need not be given sua sponte by the trial court." (*Id.* at p. 1333.) It cited our Supreme Court's determination that a provocation instruction is a pinpoint instruction because it " 'relates particular facts to an element of the charged crime and thereby explains or highlights a defense theory.' " (*Ibid.*, quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 778.)

The *Hernandez* court then rejected the defendant's argument based on *People v. Rogers* (2006) 39 Cal.4th 826: "As reflected in *Rogers*, the fact that a trial court is not required to instruct on provocation for second degree murder *at all* supports that it is not misleading to instruct on provocation without explicitly stating that provocation can negate premeditation and deliberation. Although CALCRIM No. 522 does not expressly state provocation is relevant to the issues of premeditation and deliberation, when the instructions are read as a whole there is no reasonable likelihood the jury did not understand this concept. Based on CALCRIM No. 521, the jury was instructed that unless defendant acted with premeditation and deliberation, he is guilty of second, not first, degree murder, and that a rash, impulsive decision to kill is not deliberate and premeditated. Based on CALCRIM No. 522, the jury was instructed that provocation may reduce the murder to second degree murder." (*Hernandez, supra,* 183 Cal.App.4th at pp. 1333–1334.) The court continued, "In this context, provocation was not used in a technical sense peculiar to the law, and we assume the jurors were aware of the common

meaning of the term. [Citation.] Provocation means 'something that provokes, arouses, or stimulates'; provoke means 'to arouse to a feeling or action[;]' . . . 'to incite to anger.' (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 938; see *People v. Ward* (2005) 36 Cal.4th 186, 215 ['provocation . . . is the defendant's emotional reaction to the conduct of another, which emotion may negate a requisite mental state'].) Considering CALCRIM Nos. 521 and 522 together, the jurors would have understood that provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation. [¶] We are satisfied that, even without express instruction, the jurors understood that the existence of provocation can support the absence of premeditation and deliberation. Thus, without a request for further instruction, the trial court was not required to amplify the instructions to explain this point." (*Id*. at p. 1334.)

Defendant attempts to distinguish these cases. He contends *Jones* should be ignored because it did not consider the argument that "provocation" had a technical meaning peculiar to the law and did not "correctly apply the fundamental principle that jurors are presumed to apply the instructions as a whole"; he argues the discussion of this subject in *Hernandez* was merely dicta, did not address the objective and subjective standards of provocation, and did not involve an instruction on voluntary manslaughter based on heat of passion.

Defendant's efforts to distinguish *Jones* and *Hernandez* are unpersuasive. He does not cite any legal authority that holds "provocation" has a technical meaning peculiar to the law; he merely argues that the effect of provocation on a defendant's subjective state of mind in regard to second degree murder differs from the "ordinary" definition of provocation. *Hernandez* rejected just such an argument in concluding that the term "provocation" does *not* have a definition peculiar to the law, and we agree with its analysis.

Defendant also argues that "an instruction on the technical and peculiar legal meaning of provocation in the context of second degree murder is particularly acute and important where, as here, the jury is given the legal definition of provocation in the

context of voluntary manslaughter—a sort of provocation which has a different meaning than provocation in the context of second degree murder." This argument suggests there is an ambiguity between CALCRIM Nos. 522 and 570 because No. 570 *defines* "provocation" as objective in nature, which definition jurors could easily apply to second degree murder in the absence of any other definition. But No. 570 does no such thing. Rather, it indicates that the *type* of provocation required for a voluntary manslaughter conviction is of an objective nature. As the *Jones* court concluded, CALCRIM Nos. 521 and 522 together instruct that " 'provocation (the arousal of emotions) can give raise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation.' [Citation.] As the jury also was instructed, a reduction of murder to voluntary manslaughter *requires more*." (*Jones*, *supra*, 223 Cal.App.4th at p. 1001, italics added.) We see no ambiguity in these instructions.

In short, defendant's instructional error argument lacks merit. Also, as we have already discussed, the only evidence of provocation was defendant's testimony that Vega rejected him, scorned him and told him she loved another man, causing him to decide to threaten her with a knife to reveal the man's identity and kill himself. Upon confronting her in the bathroom with his plan to kill himself, he said, she tried to stop him and he unthinkingly stabbed her to death. His testimony was patently incredible, while the evidence that he deliberately and premeditatedly murdered Vega was ample. Therefore, even if the trial court's provocation instructions were in error, the error was harmless under both the federal and state standards for evaluating the impact of such an error. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [federal]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state].)

DISPOSITION

The judgment is affirmed.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

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